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Supreme Court of the United States

OCTOBER TERM, 1945.

CLARK OIL COMPANY AND PLYMOUTH CLARK OIL COMPANY,
Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, THE PURE OIL COMPANY, STANDARD OIL COMPANY (INDIANA), SINCLAIR REFINING COMPANY, SHELL PETROLEUM CORPORATION, SOCONY-VACUUM OIL COMPANY, INCORPORATED, SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, AND CITIES SERVICE OIL COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Supreme Court of the United States:

Come now the Clark Oil Company and the Plymouth Clark Oil Company, the above-named Petitioners, and file this, their Petition for a Writ of Certiorari in the above matter, and respectfully show to the Court:

1. That the matter involved arises out of the *Madison Oil* conspiracy case, 310 U. S. 150, 60 S. Ct. 811, 84 L. ed. 1129, and is a claim for damages by Petitioners, oil jobbers, against the Respondents because of overcharges made in the sale of gasoline because of a conspiracy to raise the prices of gasoline, for which conspiracy Respondents were duly convicted.

2. That this Court has jurisdiction because the action is one to recover damages under the Sherman Anti-Trust Act of July 2, 1890, Chapter 647, 26 Stat. 209, Title 15, Mason's U. S. Code, Sec. 1, U. S. C. A., Title 15, Sec. 7, and the Clay-

ton Act, Title 15, Sec. 15, Mason's U. S. Code, 15 U. S. C. A. 15.

3. That the questions presented by this writ are:

(A) Whether oil jobbers may recover as damages an overcharge of 2¼¢ per gallon for gasoline purchased by them from producing oil companies, where the overcharge was the result of a completed conspiracy to violate the Sherman Anti-Trust Act.

(B) Whether the fact that the gasoline so purchased by the jobbers from the conspirators was later sold "in the ordinary course of business" prevents the jobbers from recovering the overcharge or illegal exaction of 2¼¢ per gallon, made because of the conspiracy.

(C) Whether the oil companies may keep their illegal exactions so made and cannot be made to repay them to the jobbers from whom they made such illegal exactions.

4. That the reasons relied on for the allowance of the writ are the following:

(A) That because of a completed conspiracy to violate the Sherman Anti-Trust Act, the Respondents, being major oil companies, illegally exacted from Petitioners, oil jobbers, 2¼¢ per gallon more for gasoline which they purchased than they would have paid but for the conspiracy; that upon a complaint alleging such facts the District Court entered a summary judgment against Plaintiffs (Petitioners here).

(B) That the Circuit Court of Appeals of the Eighth Circuit erroneously affirmed the District Court and held that the major oil companies, Respondents, were not, in the first instance, liable for the illegal exaction of 2¼¢ per gallon, as alleged in the complaint. (Complaint, Par. 19, R. 71-72; Opinion, R. 135; Complaint, Par. 26, R. 74.)

(C) That the Circuit Court of Appeals of the Eighth

Circuit further erroneously held that even if the major oil companies were, in the first instance, liable for the illegal exaction of 2¼¢ per gallon, the Petitioners could not recover this illegal exaction because they sold the gasoline so purchased "in the ordinary course of business" (Opinion, R. 135, 138, 139, 141).

(D) That the Petitioners were deprived of their right to a jury trial.

(E) That Petitioners, because of the conspiracy, were forced to pay money out of pocket which they would not have had to pay but for the conspiracy, and were injured in their business and property.

(F) That Respondents, conspirators, have retained their illegal exactions so made of Petitioners.

(G) That a final judgment on the pleadings and a pretrial hearing was erroneously entered against Petitioners by the Circuit Court of Appeals on the 11th day of April, 1945, (R. 142-143), denying them a right of recovery of the illegal exactions made by the conspirators, Respondents.

(H) That the judgment of the Circuit Court of Appeals of the Eighth Circuit is in conflict with the spirit of the Sherman Anti-Trust Act and contrary to the trend of the decisions of this Court.

(I) That the decision of the Circuit Court of Appeals of the Eighth Circuit, holding that plaintiff must sue for profits ("plaintiff's right of recovery from defendants is dependent upon both the buying and selling prices," Opinion, 8th Cir., R. 139), is in conflict with the decision of the Circuit Court of Appeals of the Second Circuit, 297 Fed. 791-803, wherein the Second Circuit held that whether "plaintiffs sold to their customers at a profit or loss becomes immaterial in this case" where there was an over-charge due to a conspiracy.

(J) That although the decision of the Circuit Court of Appeals for the Eighth Circuit is contrary to the general rule prevailing in this Court, the precise question has never been determined; that many cases await a decision of the points here raised.

5. That a Writ of Certiorari should be granted herein because the judgment of the Circuit Court of Appeals is final but is wrong, contrary to law, and in conflict with the holding of the Second Circuit and with the general holdings of the Supreme Court of the United States, although the definite and precise question has never been decided by the Supreme Court.

BRIEF SUMMARY OF FACTS INVOLVED

Petitioners were oil jobbers. As alleged in the complaint, they purchased large quantities of oil from the Phillips Petroleum Company, their supplier (Complaint, Par. 26, R. 74). That company and the other Respondents were, concededly, on the motion for summary judgment, guilty of a conspiracy to violate the laws of the United States by raising the prices of gasoline (Complaint, Par. 22, R. 72-73). Their conviction was upheld in *U. S. vs. Socony-Vacuum Oil,* 310 U. S. 150, 60 S. Ct. 811, 84 L. ed. 1129.

The District Court on a motion for summary judgment on the complaint, plus a statement made at a pre-trial hearing, entered judgment for Defendants. The Circuit Court of Appeals of the Eighth Circuit affirmed. The case is reported in 148 Fed. (2d) 580 (R. 135-142).

(For convenience of this Court in referring to the opinion of the Circuit Court, we will refer to the pages of the transcript of Record wherein the opinion is incorporated. The opinion appears on pages 135-142.)

The complaint and pre-trial hearing disclosed:

1. That the Defendants had been convicted of a conspiracy to raise the price of gasoline (Complaint, Par. 22, R. 72-73).

2. That the price of gasoline purchased by the jobbers, the above Petitioners, was 2¼¢ more per gallon than it would have been but for the conspiracy (Complaint, Par. 19, R. 71-72; Par. 26, R. 74).

3. That Petitioners had to pay 2¼¢ per gallon more out of pocket than they would have but for the conspiracy (Complaint, Par. 26, R. 74).

4. That the gasoline so purchased was later sold by the jobbers in the ordinary course of business (R. 113, pre-trial hearing).

The District Court stated the facts as follows:

> "The defendants herein have been found guilty of violating the Sherman Anti-Trust Act by their actions of which plaintiffs now complain, and that conviction was sustained by the United States Supreme Court in *United States vs. Socony-Vacuum Oil Company, Inc., et al.* (1940), 310 U. S. 150. Consequently, there is *no question at this time as to whether defendants have committed an act forbidden by the anti-trust law.* The only issue pertains to plaintiffs' right to recover as a 'person * * * injured in his business or property'" (R. 115-116).

The District Court entered judgment against Plaintiffs, holding:

(A) That the conspirators were not in the first instance liable for the illegal exaction of 2¼¢ per gallon charged the jobbers.

(B) That the fact that the Plaintiffs (Petitioners here) sold the gasoline "in the ordinary course of business" prevented them from recovering the illegal exaction made in the first instance by the conspirators.

(C) That, in effect, the Defendants (Respondents here), conspirators, were entitled to keep their illegal exactions.

The Circuit Court of Appeals affirmed the judgment entered by the District Court (148 Fed. (2d) 580) (R. 135-142). To review the judgment so rendered this writ is sought.

WHEREFORE, because

(A) the judgment of the Circuit Court of Appeals is final but wrong; and (B) because the judgment of the Circuit Court of Appeals is contrary to the rule in the Second Circuit and to the general rule prevailing in the Supreme Court of the United States, although the precise question has never been determined; and (C) because Petitioners were deprived of money and overcharged as a result of the conspiracy and forced to pay money out of pocket which they would not have had to pay but for the conspiracy—

Your Petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the Record and the proceedings in the Circuit Court of Appeals in said cause, being No. 12,950 and entitled *"Clark Oil Company, et al., Appellants, vs. Phillips Petroleum Oil Company, et al., Appellees,"* and that the judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and that your Petitioners have such other relief in the premises as to the Court may seem proper.

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Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FACTS

A summary judgment was granted on the ground the complaint did not state a cause of action.

The major oil companies above named, among others, entered into a conspiracy (Complaint, Par. 22, R. 71-72) which resulted in Petitioners paying 2¼¢ more per gallon than they would otherwise have paid for gasoline purchased from Defendant Phillips Petroleum Company (Par. 19, R. 71, 72; and Par. 26, R. 74, Petitioners' Complaint).

The Defendants were found guilty of the conspiracy in the so-called Madison Oil cases. (*U. S. vs. Socony-Vacuum,* 310 U. S. 150, 84 L. ed. 1129.)

At a pre-trial hearing Petitioners' counsel conceded that the gasoline purchased at the excessive price was later sold "in the ordinary course of business" (R. 113).

With the Record in this state, consisting *only* of the *complaint* and this *statement,* the District Court granted Respondents' motion for summary judgment.

The District Court did this because it was of the opinion that the "mere fact" of an "illegal exaction" or overcharge on the part of the oil companies, due to the conspiracy, was not sufficient to create a liability (R. 120).

The District Court was of the opinion also that because the gasoline had been sold by Petitioners "in the ordinary course of business," they could not recover the illegal exaction made of them in the first instance by the conspirators (R. 118-119).

The Circuit Court of Appeals stated the facts as follows:

"Defendants, beginning in 1932 and continuously

thereafter, conspired together to raise and did raise the spot market tank car prices of gasoline in the Mid-Western area, which included gasoline sold to plaintiffs, by approximately 2¼¢ per gallon higher than it would have been had not the price been artificially set. * * *" (R. 136-137).

"It is alleged that the exaction *damaged* plaintiffs *by a sum equal to 2¼¢ per gallon* purchased during the life of their contract with the Phillips Petroleum Company. * * *" (R. 137).

Judgment was entered on motion of Defendants for summary judgment, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 142).

Clark Oil Co., et al., vs. Phillips Pet. Co., 148 Fed. (2d) 580 (R. 136).

The Petitioners contended:

(1) That the illegal exaction was a tort and that a cause of action arose in their favor immediately when the illegal exaction or overcharge was made.

(2) That the fact that the gasoline was later sold in the ordinary course of business was of no concern to the conspirators.

QUESTIONS PRESENTED NEVER DIRECTLY DECIDED BY THIS COURT

While the decisions of this Court in similar cases clearly indicate the error of the Circuit Court of Appeals and the District Court, the precise questions presented have never been decided by this Court.

TWO CIRCUIT COURTS OF APPEAL DIFFER

The Circuit Court of Appeals for the Eighth Circuit in the present case held that the "plaintiffs' right of recovery from defendants is dependent upon both the buying and selling prices." (Opinion, Eighth Circuit, R. 139.)

The Circuit Court of Appeals for the Eighth Circuit in *Straus vs. Victor Talking Machine Co.*, 297 Fed. 791, 803, held that whether "plaintiffs sold to their customers at a profit or a loss becomes immaterial in this case" in view of the fact that the plaintiffs had to purchase goods in a closed market created by the conspirators.

DECISIONS RELIED ON BY PETITIONERS

Complaint to Be Liberally Construed

In a case arising under the Sherman Anti-Trust Act this Court specifically said that the complaint should be liberally construed.

Stevens vs. Foster, 311 U. S. 255, 61 S. Ct. 210, 85 L. ed. 173.

Sherman Act to Be Liberally Construed

There is no question but that the Sherman Act is to be liberally construed to effectuate its humane purpose.

See *Ramsey vs. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368.

And it is true that the Act was designed to protect the public against the evils incident to monopolies and combinations in restraint of trade.

Paramount Famous Lasky Corp. vs. U. S. A., 282 U. S. 30, 75 L. ed. 145.

The Statutes

The Sherman Act provides in Section 7—

> "Any person who shall be injured in his business or property * * * by reason of anything forbidden or declared to be unlawful by this Act * * * shall recover three-fold the damages by him sustained."
>
> 26 Statutes 209, 15 U. S. C. A., §15.

The Clayton Act by Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust laws shall recover three-fold the damages by him sustained."

38 Statutes 71, U. S. C. A. 15, Subdivision 15.

Immediate Victim to Be Protected

This Court has said:

> "The immediate victim of a violation of the Sherman Law should not be denied redress * * * when mulcted by a violator."
>
> *State of Georgia vs. Evans*, 316 U. S. 159, 86 L. ed. 1346, 62 S. Ct. 972.

Cases Most Nearly in Point

The complaint alleges an illegal exaction from the jobber of 2¼¢ per gallon (Par. 19, R. 71, 72, and Par. 26, R. 94). The illegal exaction was made because of the conspiracy. In this proceeding the allegations of the complaint must be taken as true.

Illegal Exaction a Tort

> "If the defendants exacted from them an unlawful charge *the exaction was a tort* for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer."
>
> *Adams vs. Mills*, 286 U. S. 407, 76 L. ed. 1191.

Accrual of Cause of Action

"In contemplation of law the claim for damages arose *at the time the extra charge was paid.*"
Adams vs. Mills, 286 U. S. 407, 76 L. ed. 1191.

Plaintiffs Entitled to Purchase in a Free Market

In *Straus vs. Victor Talking Machine Company,* 297 Fed. 791, Justice Mayer speaking for the Circuit Court of Appeals of the Second Circuit said:

> "Plaintiffs had the right *to purchase* Victor records *in a free market.* This right was *invaded* by defendants and plaintiffs were forced to buy in a *closed market created* and held *by the illegal combination.*" (297 Fed. 791, 799.)

This is the situation in the case at bar.

Petitioners had a right to buy gasoline in a free market; they could not do it. There was a closed market; a conspirator's market; a market where higher prices were charged.

The trial court in the Straus case held that under the facts an issue was presented for the jury on the question of damages, the trial court charging the jury as follows:

> "Now, what is the nature of those damages? If a man can go out in *an open and free market* and buy goods at a certain price, and then, because the market is closed to him illegally and he is *compelled to pay more,* his damage is the *difference* between what he would have paid in an *open* and *free* market and what he *actually did pay* under the conditions of the *illegally closed market.*"
> *Straus vs. Victor Talking Machine Co., supra.*

The Court in his charge further said:

> "Macy's were compelled to pay higher prices *if they wanted to get goods.* They had a legal right to get

goods; they had a legal right to go out and buy as many goods as they could or wanted to, and they are entitled to recover, as their damages, the *difference* between what they would have paid for such of the goods that they actually got, as they could have gotten in the open market, *and what they did pay.*"

Straus vs. Victor, 297 Fed. 801.

Not an Action for Profits

We quote from the Straus case:

"In the case at bar, plaintiffs have not sued for damages due to *loss of profits.* Their position is that they were *entitled to buy goods in a free market;* that they were prevented from doing this by defendants' illegal combination; that they were *forced,* therefore, *to buy in the market which defendants had created,* and were thus *compelled to pay more* for their goods than the price which in that market was the fair and reasonable price established by defendants themselves."

Straus vs. Victor, 297 Fed. 802-3.

To again quote from the Straus case:

"Plaintiffs contend, and rightly, that they *were not forced to sue for damages for loss of profits, and thus run the risk of no recovery,* because, plainly, the restrictive arrangement prior to May 1, 1914, furnished no standard of comparison with sales made, or profits increased or lost, by plaintiffs during the period thereafter, when they could sell as they pleased. *They contended for a rule of damage which seeks the proximate cause of damage and the proximate result occasioned by that cause.*"

Straus vs. Victor, 297 Fed. 803.

As to the payment required, in the Straus case, the Court again used language applicable to the situation existing in the case at bar:

"Plaintiffs were compelled to pay more than this reasonable price. Why? Manifestly because the *illegal combination forced them so to do in order to carry on*

the requirements of their business. Whether, then, plaintiffs sold to their customers at a *profit* or *loss becomes immaterial in this case."*

Straus vs. Victor, 297 Fed. 803.

Overcharge—Liability

That conspirators are liable where a purchaser is overcharged because of a conspiracy has been settled by many decisions of this Court.

See *Chattanooga Foundry vs. City of Atlanta,* 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241.

Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. ed. 1184.

Resold in the Ordinary Course of Business

At a pre-trial hearing the following occurred:

"Mr. Searls: Is it correct to say that your claim of damages is based on gasoline that was bought and was in fact resold *in the ordinary course of business?*

Mr. Michel: Yes.

Mr. Searls: Well, I think that covers it, your Honor.

The Court: I think so" (R. 119-120).

The Record does not show that the Petitioners actually received their money back or made a profit, but we go beyond that point. Petitioners contend that on the question of resale or getting it back, the case is *controlled* by *Southern Pacific vs. Darnell,* 245 U. S. 533, 62 L. ed. 455.

The Darnell case involved an illegal exaction or an overcharge. Plaintiffs were able to get the overcharge back from their customers but the Court held this constituted no defense to the original wrong.

Mr. Justice Holmes writing the opinion in the Darnell case, said that the law *"does not inquire into later events,"* citing *Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41-

44, 58 N. E. 478, an early Massachusetts case.

Justice Holmes went squarely into this "got it back" or "passed it on" theory of damages, saying:

> "The *only question* before us is that at which we have hinted; *whether the fact that the plaintiffs were able to pass on the damage* that they *sustained in the first instance* by paying the *unreasonable charge,* and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. *The answer is not difficult. The general tendency of the law, in regard to damages, at least, is not to go beyond the first step.*"
>
> *Southern Pac. vs. Darnell,* 245 U. S. 533, 62 L. ed. 455.

Justice Holmes further said, in pointing out the logic of the conclusion arrived at, that the law did not go beyond the first step:

> "As it does not attribute *remote consequences* to a *defendant,* so it *holds him liable* if *proximately the plaintiff has suffered a loss.* The plaintiffs suffered losses to the amount of the verdict *when they paid.* Their *claim accrued at once* in the theory of the law, and it *does not inquire into later events. Olds vs. Mapes-Reeve Constr. Co.,* 177 Mass. 41, 44, 58 N. E. 478."
>
> *Southern Pac. vs. Darnell,* 245 U. S. 534, 62 L. ed. 455.

Conspirators Should Not Keep Their Illegal Gains

Justice Holmes in the Darnell case, *supra,* further said of the one guilty of making the illegal exaction: "The carrier *ought not to be allowed to retain his illegal profit.*"

It should here be noted that the decision of Mr. Justice Holmes was *based on an old Massachusetts case, Olds vs. Mapes-Reeve Construction Co.,* 177 Mass. 41, 58 N. E. 478.

The Mapes case was one involving a *breach of contract* for the construction of a building. This is important because the Circuit Court was misled into the idea that while the

"got it back" or "sold in the ordinary course of business" defense could *not* be asserted under the Interstate Commerce Act that it *could* be asserted under the Sherman Act. But the Darnell case *was not based on any rate decision,* but on an ordinary simple *building contract.*

In a later case Mr. Justice Brandeis quoted the contentions of the Defendants, saying:

> "The defendants contend that, *even if the exaction of the extra 25-cent charge was unlawful,* the *plaintiffs* are *not* entitled to recover. The argument is that under Section 8 of the Interstate Commerce Act the liability of the common carrier is 'to the *person* or *persons injured thereby* for the full amount of damages sustained in consequence of any such violation'; that before any party can recover under the act he must show, *not merely the wrong of the carrier, but that the wrong has in fact* operated to the plaintiff's *injury.*"
>
> *Adams vs. Mills,* 286 U. S. 406, 76 L. ed. 1191.

Justice Brandeis further set forth the contentions of the Defendants, the wrongdoers in that case, saying:

> "That *here* the award is to the plaintiffs *individually, not as agents* for the *shippers;* and that *individually* they suffered *no pecuniary loss,* since they paid the charges *as commission merchants* and *reimbursed themselves for these, as for other, charges* from the proceeds *of the sale* of livestock, remitting to their principals only the *balance* remaining. We think the argument *unsound,* for the reasons, among others, stated in *Southern Pacific vs. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451."
>
> *Adams vs. Mills, supra.*

Justice Brandeis met the reimbursement defense head on.

> "Neither the *fact of subsequent reimbursement* by the plaintiffs from funds of the shippers nor the *disposition* which may hereafter be made of the damages recovered is *of any concern to the wrongdoers.*"
>
> *Adams vs. Mills, supra.*

The Adams case is the complete answer to the contention of the wrongdoers in the present case on the "ordinary course of business" theory.

The Supreme Court in the Adams case clearly held that the Plaintiffs suffered injury "*when they paid*" the illegal exaction.

The Supreme Court definitely said that a right of recovery existed in favor of the parties who "*in the first instance*" paid the unlawful charge. We quote:

> "The plaintiffs have suffered injury within the meaning of Section 8 of the Interstate Commerce Act; and the purpose of that section would be *defeated* if the *tortfeasors were permitted to escape reparation* by a plea that the *ultimate incidence* of the injury *was not* upon those who were compelled *in the first instance to pay the unlawful charge.*"
>
> *Adams vs. Mills*, 286 U. S. 408, 76 L. ed. 1192.

To the same effect is *Olliphant vs. Florida East Coast Ferry Co.*, 4 Fed. Supp. 288.

See also *Queen Ins. Co. of America vs. Globe & Rutgers*, 44 S. Ct. 175, 263 U. S. 487, 68 L. ed. 402, in which Mr. Justice Holmes said that we "generally are to *stop our inquiries with the cause nearest to the loss.*"

Where Plaintiffs were overcharged they were "entitled to reparation; that is, to be made whole—to be compensated for a loss because of an *illegal* and unreasonable *exaction.*"

> *Mills vs. Lehigh Valley Ry. Co.*, 238 U. S. 482, 35 S. Ct. 888, 892, 59 L. ed. 1414, 1418.

The Mills case holds that an overcharge is in and of itself a damage. (*Mills vs. Lehigh Valley*, 238 U. S. 481, 35 S. Ct. 891, 59 L. ed. 1418.)

Mr. Justice Pitney in a dissenting opinion in *Pennsylvania Railway Co. vs. Int. Coal Mining Co.*, 230 U. S. 214, 33 S. Ct. 903, 57 L. ed. 1458, used this language:

> "But Congress, I submit, never intended to impose upon the injured party the impossible task of tracing his ultimate losses to this or that shipment."

It is interesting to note in the opinion of Justice Pitney that he said: "At the common law a shipper who had been charged an unreasonable rate could recover back the excess." (*Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 237-238, 57 L. ed. 1467.)

Mr. Justice Pitney dealt with the "got it back" or "sold in the ordinary course of business" theory. He said:

> "If complainants were obliged to follow every transaction to its ultimate result, and to trace out *the exact commercial effect* of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them."
>
> *Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 241, 33 S. Ct. 914, 57 L. ed. 1469.

Again Justice Pitney used language which is pertinent in the present case:

> "Certainly *these defendants are not entitled to this money* which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount *because the complainants themselves may have obtained some portion* of this sum from the *consumer* of the commodity transported."
>
> *Pa. Ry. Co. vs. Int. Coal Min. Co.*, 230 U. S. 242, 33 S. Ct. 914, 57 L. ed. 1469.

Respondents' Claim Not Based Wholly on "Rate Cases"

The Circuit Court of Appeals held Plaintiff could not recover, holding that the decisions of the Supreme Court of the United States allowing recovery in the first instance were inapplicable because they were "rate cases." The Circuit Court also held that the Darnell case as to reimbursement was not in point because it was a rate case (148 Fed. (2d)

580) (R. 141-142). The Court *overlooked* the fact that Justice Holmes *based his decision* on the Mapes case, a *building contract* case. (See *Southern Pac. vs. Darnell*, 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451.)

The Circuit Court held that a "different rule" existed in rate cases under the Interstate Commerce Act, but the Supreme Court of the United States in an overcharge case, *not* under the Interstate Commerce Act, but under the Sherman Anti-Trust Act, held that there *could be a recovery where there was an overcharge due to a conspiracy.*

In that case the Court said:

> "The plaintiffs *alleged* a *charge over a reasonable rate* and the *amount* of it. If the charge be true that *more than* a reasonable rate *was secured by the combination* the *excess* over what was reasonable was *an element of injury.*"
>
> *Thomsen vs. Cayser*, 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

In the Cayser case Mr. Justice McKenna, who wrote the opinion, further said:

> "Besides, plaintiffs *alleged an overcharge*, and the verdict of the jury was *for its amount* and interest."
>
> *Thomsen vs. Cayser, supra.*

Pecuniary Loss Alleged

A pecuniary loss was alleged in the complaint (Par. 19, R. 71-72). The illegal exaction or overcharge of 2¼¢ is definitely set forth in the complaint (Complaint, Par. 19, R. 71-72; Par. 26, R. 74; Par. 6, R. 66).

Where there is a payment or an overcharge which "arises out of the *wrongful exaction* from the shipper," such wrongful exaction in and of itself constitutes a pecuniary loss.

> *Louisville & Nashville Ry. vs. Sloss, etc.*, 269 U. S. 217, 46 S. Ct. 73, 70 L. ed. 242.

We quote further from the Sloss case. The shipper "was damaged to the extent of the *difference* between the charges *paid* and those that *would have accrued at the rates found reasonable.*"

Pecuniary loss was shown by the mere illegal exaction, or as the Court said, by "the amount of the excess exacted."

Louisville & Nashville Ry. vs. Sloss, etc., 269 U. S. 235.

The Errors of the Circuit Court

The Circuit Court of Appeals said:

> "Plaintiffs are seeking, not compensation for damages suffered by defendant's illegal acts, but profits because of said acts" (148 Fed. (2d) 580) (R. 139).

This is not correct. Plaintiffs are seeking a recovery for the overcharge as alleged in the complaint and as set forth by the Circuit Court of Appeals in its opinion (148 Fed. (2d) 580), quotation on page 581, wherein the Court said that Plaintiffs sought to recover damages because the price was "approximately 2¼¢ per gallon higher than it would have been had not the price been artificially set" (R. 136-137).

A damage arose when the illegal exaction was paid. Suppose the gas had been destroyed en route! The jobbers would have lost the extra 2¼¢ per gallon. Then there could have been no "ordinary course of business" sales as a defense. Extra capital, perhaps interest and carrying charges could be involved because of the extra and illegal charge made in the first instance. These considerations clearly indicate an *original liability.* Once we reach *this* conclusion, liability follows here, because *the resale question is of no concern to the wrongdoers* under the Darnell and Adams cases.

The Circuit Court said that the law does not contemplate "that damages shall be recoverable by two where only one

has suffered injury." No such question was involved, but this goes back to the contention that ultimate consumers might recover but that the Plaintiffs were not entitled to recover from the conspirators because the gasoline was sold in the usual course of business.

The *Darnell vs. Adams* and *Southern Pac. vs. Darnell*, cases, *supra*, both hold that what subsequently becomes of the recovery or the fact of later reimbursement is of no "concern to the wrongdoer."

Again the Circuit Court says:

> "Plaintiffs' right to recover from Defendants is dependent upon both the buying and selling prices" (R. 139).

It *does not so appear from the complaint*, and the statement above made is contrary to the rule laid down by this Court in the following cases:

Chattanooga Foundry vs. City of Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. ed. 241.

Thomsen vs. Cayser, 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

Southern Pac. vs. Darnell, 245 U. S. 531, 38 S. Ct. 186, 62 L. ed. 451.

Adams vs. Mills, 286 U. S. 397, 52 S. Ct. 589, 76 L. ed. 1184.

And it is contrary to the holding of the Circuit Court of the Second Circuit in *Straus vs. Victor Talking Machine Co.*, *supra*.

The Circuit Court further says that the Darnell and Adams cases were tariff cases "to recover freight overcharges."

Adams vs. Mills was an action against railroads and stockyards companies to recover an extra charge of 25¢ a car *for unloading livestock*.

The Circuit Court was of the opinion that the Adams and

Darnell cases were not in point because published rate tariffs were involved in those cases, but *Adams vs. Mills* involved an extra charge of 25¢ a car for unloading livestock, not involved in a published tariff. In the Adams case the lower court "rested its decision on the ground that the exaction of the extra 25¢ charge was *a wrongful practice,*" and this Court said:

> "In contemplation of law the claim for damages arose at the time the extra charge was paid."
>
> *Adams vs. Mills*, 286 U. S. 407, 76 L. ed. 1191.

Certainly under these facts the question of a published tariff was not involved.

The same principle is involved where there is an overcharge, whether there be a violation of a tariff or whether the overcharge be the result of a conspiracy.

The Circuit Court of Appeals said that the right to recover under the Interstate Commerce Act "bears little analogy to the right to recover treble damages under the anti-trust laws."

Statutes Substantially the Same

The Interstate Commerce Act provides for a recovery

> "to the person or persons injured thereby for the *full amount* of damages sustained in consequence of any such violation."
>
> U. S. C. A., Title 49, Section 8.

The Clayton Act by Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws shall recover *three-fold the damages* by him sustained."

38 Statutes 71, U. S. C. A. 15, Subdivision 15.

The Circuit Court also said that there could not be a recovery unless "damages in some amount susceptible of

expression in figures resulted" (148 Fed. (2d) 580-583), but in the Court's opinion on page 581 (R. 141-142) it is said that the complaint alleges damages of 2¼¢ per gallon for 6,273,660 gallons of gasoline which Plaintiffs purchased. It is a *mere mathematical proposition* to figure out the damages.

The Circuit Court, quoting from *Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 155, 43 S. Ct. 47, 67 L. ed. 183, as to damages, said:

> "They cannot be supplied by conjecture. To make proof of such fact would be impossible in the case before us" (R. 141).

This statement is *not consistent with the statement just referred to and made on page 581 of the opinion of the Circuit Court* (R. 136-137), wherein the damage, according to the complaint, is *definitely set at 2¼¢ per gallon* for the gasoline purchased.

Furthermore, this statement is wholly at variance with the rule laid down by this Court as to liberality of damages in anti-trust cases.

> See *Story Parchment vs. Paterson Parchment Paper Co.*, 283 U. S. 555, 51 S. Ct. 248, 75 L. ed. 544;
>
> *Stevens vs. Foster*, 311 U. S. 255, 61 S. Ct. 210, 85 L. ed. 173 (as to liberal construction of the complaint).

The Circuit Court further says that in an action under the Clayton Act the damages are "not fixed by statutory provisions, but the damages are unliquidated" (148 Fed. (2d) 583).

Again on the same page the Circuit Court says:

> "As the action to recover treble damages is *not for the amount of the overcharge exacted*, the 'illegal exaction theory' of the freight rate cases is not applicable."

But the action *is* to recover damages *for the amount of the overcharge*. The Circuit Court itself quoted from the com-

plaint on page 581 of the opinion in 148 Fed. (2d) (R. 136-137), stating the claim to be for a recovery of the excess charge of 2¼¢ per gallon.

The Keogh Case

We give a heading to the case of *Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 155, 43 S. Ct. 47, 67 L. ed. 183, because the District Court and the Circuit Court of Appeals (R. 141) relied on this case. It is no more in point than the Book of Genesis. In the Keogh case the Plaintiff's claim *was based upon a legal rate, not a tort* or an illegal exaction, *but a rate duly promulgated by the Interstate Commerce Commission* and, very significantly, the opinion in the Keogh case was written by Mr. Justice Brandeis. It was decided on November 13, *1922*. The same Mr. Justice Brandeis wrote the opinion in *Adams vs. Mills,* decided *ten years later,* May 23, *1932*.

In *Adams vs. Mills,* Mr. Justice Brandeis upheld the right of recovery for *an illegal exaction*. In his opinion in the Adams case *he did not even mention the Keogh case*.

In the Keogh case, which the Circuit Court of Appeals relied upon, the action *was based upon a legal rate*. The case was so clearly *not in point* where there was *an illegal exaction* that Justice Brandeis *did not even mention it in his opinion* in *Adams vs. Mills,* but still the Circuit Court relied upon the Keogh case, based upon *a legal rate*.

Thus we see that the Circuit Court has relied upon *one* decision of this Court as controlling, which is clearly not in point and has failed to follow controlling decisions. There should be a clarifying opinion in the present case. Many cases such as the present are pending and more will arise under the Anti-Trust Act.

The Cayser Case

And over and above all this, the Circuit Court, while relying upon the Keogh case, not in point as to facts, *failed to mention Thomsen vs. Cayser, supra,* most nearly in point as to facts and clearly in point on principle.

The leading overcharge case decided by the Supreme Court of the United States under the Sherman Act (not the Interstate Commerce Act) is *Thomsen vs. Cayser, supra.*

Thomsen vs. Cayser was an overcharge case. It involved an overcharge by ship owners. The Supreme Court held that *the payment of the excessive charge in the first instance* constituted a pecuniary loss.

Mr. Justice McKenna, speaking for the Court, said:

> "The plaintiffs *alleged* a charge *over* a reasonable rate and the *amount* of it. If the charge be true that *more* than a *reasonable* rate was secured by the combination, the *excess* over what was reasonable *was an element of injury.*"
>
> *Thomsen vs. Cayser,* 243 U. S. 66, 37 S. Ct. 353, 61 L. ed. 597.

And it should be remembered that the overcharge constitutes a pecuniary loss giving rise to a cause of action "when they paid." *Adams vs. Mills, supra.*

The Case Is Not One Involving a "Published Tariff"

Pursue *Thomsen vs. Cayser* further and we find that Justice McKenna said: "Besides, plaintiffs *alleged an overcharge,* and the *verdict* of the jury was *for its amount* and interest."

Thomsen vs. Cayser, supra, the leading case in this Court is, however, *ignored by the Circuit Court of Appeals.* An anemic distinction is made of the Darnell and Adams cases. But the Circuit Court does not even mention *Thomsen vs. Cayser.*

Conspirators Not to Be Favored

And it should not be forgotten that these conspirators should not occupy any favored seat in the Temple of Justice. They conspired to and did violate the laws of their country.

As stated by Justice Hughes, in speaking of a guilty party, he comes before the Court and "stands as a convicted felon" and he is "*subject to all the disabilities flowing* from such a judgment."

Berman vs. U. S., 302 U. S. 211, 58 S. Ct. 164, 82 L. ed. 204.

Certainly one of the disabilities or liabilities is the *repayment of the illegal exactions* made from purchasers.

What about the illegal exaction? The *oil companies received the extra 2¼¢ per gallon.* They *have never returned it to any consumers.* Is the law such that these conspirators can *keep their gains* and cannot be made to repay this illegal exaction because, perchance, an ultimate consumer has a right of recovery? The Circuit Court said there could not be two recoveries. But if a consumer brought suit, would not the conspirators say they were *not in privity* with the sellers? But if consumers can later recover from the jobbers this, as said in *Adams vs. Mills*, is of no concern to the wrongdoers.

The fact that an ultimate consumer may have a claim against the jobber is no defense to the conspirators. Mr. Justice Holmes and Mr. Justice Brandeis have said that the law does not go beyond the first step, and that the matter of subsequent reimbursement is not of any concern to the wrongdoers.

The conspirators in the Madison Oil cases have escaped unscathed. They *have kept their ill-gotten gains.*

The decision of the Circuit Court of Appeals *is not right.* It permits wrongdoers to keep their ill-gotten gains on the

theory that the decisions in the so-called rate cases are not applicable because they were brought under the Interstate Commerce Act. But the Circuit Court failed to at all consider *Thomsen vs. Cayser,* which was brought under the Sherman Act. This case was urged upon the court below in the briefs and in the oral argument. The *opinion of the Circuit Court does not even mention it.*

The decision of the Circuit Court is clearly wrong and should not stand. It relies on the Keogh case and overlooks the Cayser case. It slides by *Adams vs. Mills* and the Darnell case. It is contrary to *Straus vs. Victor Talking Machine Company* (C. C. A., 2nd Cir., *supra*).

The precise questions here involved have never been determined. With Sherman Anti-Trust cases being so frequently before the lower courts, the questions should be determined by this Court.

Respectfully submitted,

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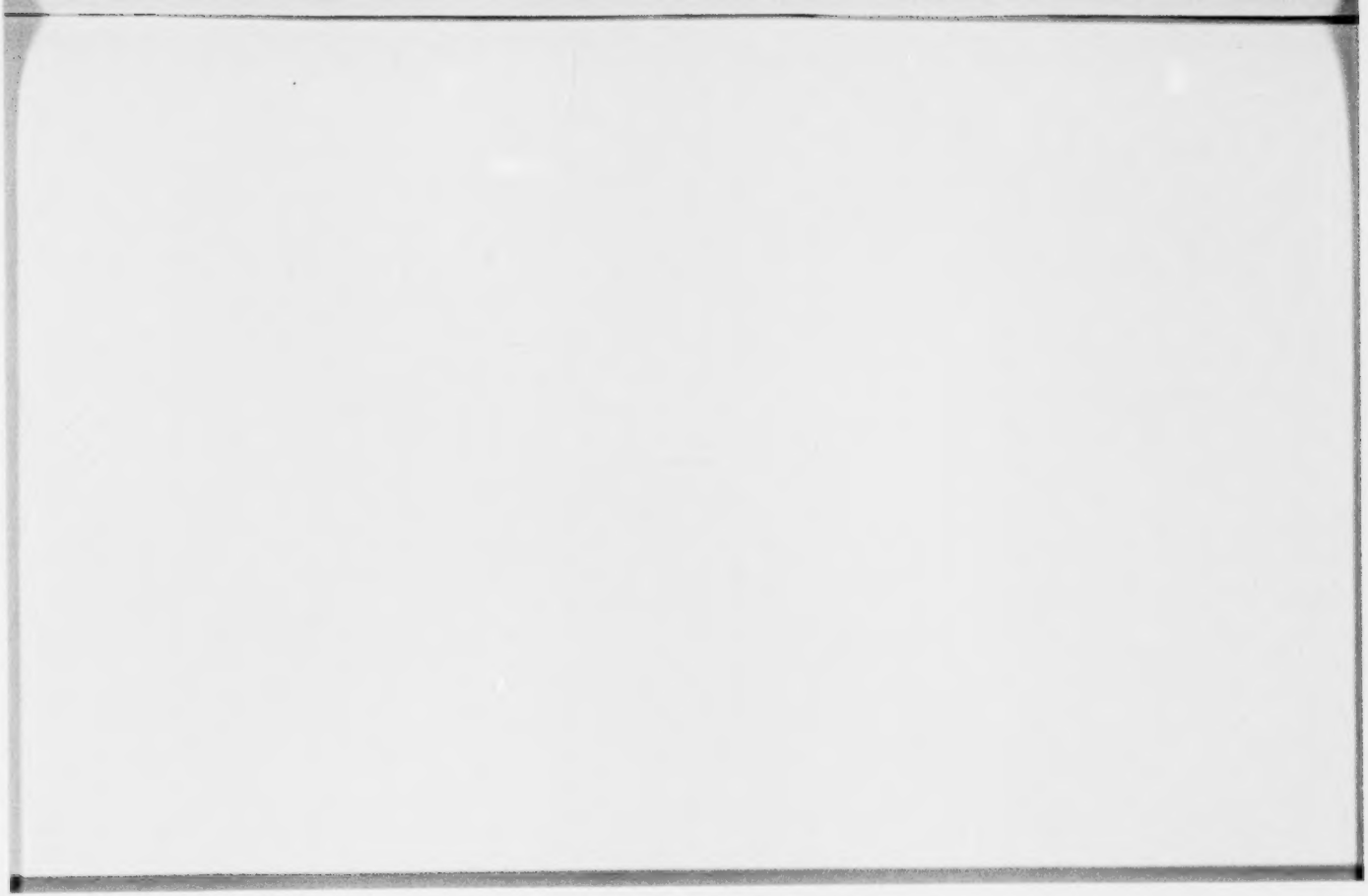

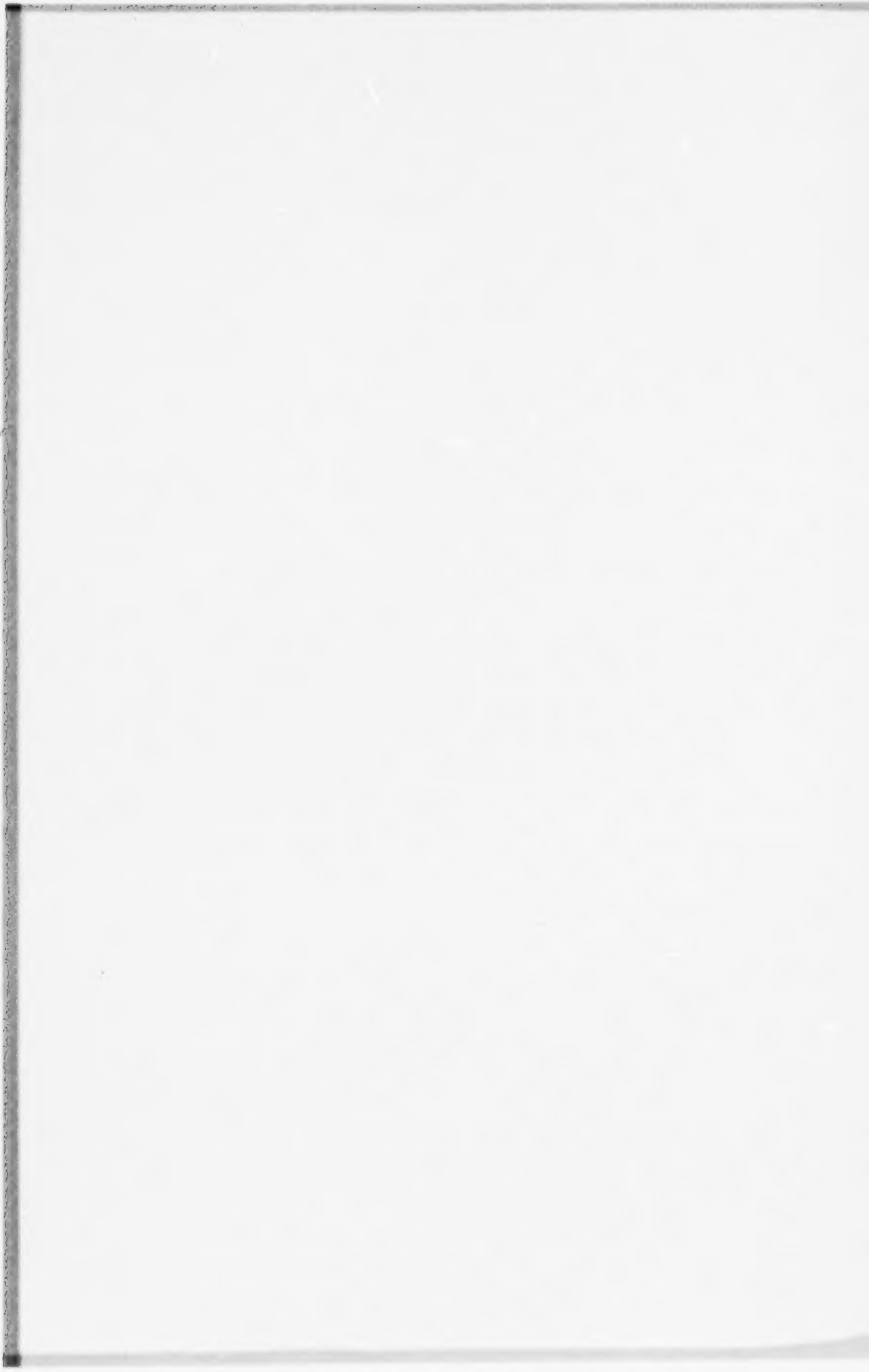

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 216

CLARK OIL COMPANY AND PLYMOUTH CLARK OIL COMPANY,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS, PHILLIPS PETROLEUM COMPANY, THE PURE OIL COMPANY, SINCLAIR REFINING COMPANY, SHELL OIL COMPANY, INC., SOCONY-VACUUM OIL COMPANY, INC., SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, AND CITIES SERVICE OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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The opinion of the Circuit Court of Appeals appears on pages 135 to 142 of the Record, and is reported in 148 F. (2d) 580 (April 11, 1945). The opinion of the District Court appears on pages 114 to 126 of the record, and is reported in 56 F. Supp. 569 (D. C. D. Minn., 3rd Div., 1944).

Jurisdiction.

Petitioners assert that the jurisdiction of this Court is invoked on the ground that the case is based upon an alleged violation of the Sherman and Clayton Anti-Trust Acts. Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. Section 1; Act of October 15, 1914, 38 Stat. 730, 15 U. S. C. A. Section 15 (petition for writ of certiorari, p. 1).

Statement of the Case.

This action is brought by petitioners, Clark Oil Company and Plymouth Clark Oil Company, to recover under the antitrust laws treble the damages alleged to have been sustained by them as a result of the conspiracy for which the respondents were convicted in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940) (Madison Oil Case).

Petitioners allege in their complaint that they are jobbers engaged in the business of buying and selling gasoline (R. 67); they further allege that they paid a higher tank car price for gasoline during the years 1935 and 1936 as a result of the conspiracy charged in the Madison Oil Case (R. 71); and they seek to recover treble the amount of such increase in price irrespective of pecuniary damage in their business or property (R. 112-113).

Petitioners' purchase price was determined under a contract with Phillips Petroleum Company which provided that petitioners would be guaranteed a margin of 3½¢ per gallon on the gasoline bought and resold by them (R. 20). Petitioners admitted at a pre-trial conference that they were not claiming that they had sustained any lessening in their margins on gasoline bought and resold, that their claim of damages was in fact based on gasoline bought and resold in the ordinary course of business, and that they were seeking to recover treble the amount of the increase in price paid by them under a so-called illegal exaction theory, regardless whether such increase in price resulted in a pecuniary loss in their business or property (R. 112-113).

Respondents filed a motion for summary judgment, which was based on certain exhibits, the pleadings and the subsequent stipulations at the pre-trial conference (R. 76,

113). No affidavits were filed and no evidence was offered by petitioners in opposition to this motion. Hon. Gunnar H. Nordbye granted respondents' motion and wrote an opinion which appears at pages 114-126 of the Record, and in 56 F. Supp. 569 (D. C. D. Minn., 3rd Div., 1944). Judge Nordbye held:

> (1) A jobber, who is engaged in the business of buying and selling gasoline, is not entitled to recover damages merely because there has been an increase in the price of gasoline as a result of a conspiracy, but he must show that he sustained a pecuniary loss as a result of such increase in price.
>
> (2) This principle was first enunciated in the so-called treble damage oil cases by the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711, and was followed by the Seventh Circuit Court of Appeals in *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792.
>
> (3) The plaintiffs do not suggest that they be permitted to amend their second amended complaint, and, therefore, this case should be dismissed on the merits (R. 120, 125).

The Circuit Court of Appeals affirmed this judgment and found as a fact that no damages resulted to petitioners, that the gasoline was all sold in due course, and that the increase in price was passed on to their customers. The Court held that petitioners were seeking "not compensation for damages suffered by defendants' illegal acts, but profits because of said acts", and that as there was no basis for recovery of compensatory damages, the trial court correctly entered a summary judgment in favor of respondents (R. 138-139, 142).

Since this is an appeal from an order sustaining defendants' motion for summary judgment, defendants will assume for the purpose of this appeal that the allegations in plaintiffs' complaint and the indictment in the Madison Oil Case in regard to the conspiracy and the increases in prices are true.

SUMMARY OF ARGUMENT.

I.

The petition for writ of certiorari should be denied because the finding of fact of both the trial court and the Circuit Court of Appeals that petitioners sustained no damages is supported by these undisputed facts: petitioners admitted at the pre-trial hearing that they were not claiming any lessening in their margins and that their claim was based on gasoline which they bought and resold (R. 112-113); they had the protection of the guaranteed margin provision of their supply contract (R. 20); and they based their case upon the Madison Oil Case in which the conspiracy charged by the Government and found to exist by the Supreme Court was one which had for its purpose the raising of the whole price structure of gasoline in the Mid-Western area, which would include both the buying and selling prices of petitioners (R. 37-38). *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, 192 (1940). Petitioners did not offer any evidence or affidavits in opposition to the motion for summary judgment.

II.

The petition for writ of certiorari should be denied because petitioners' contention in this case that a person is entitled to recover under the Clayton Act treble the amount of any increase in price resulting from a conspiracy, irrespective of pecuniary loss, has been decided already by the Supreme Court adversely to this contention. Petitioners' claim is based upon the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*,

245 U. S. 531, 534 (1918) and other tariff overcharge cases, in which the Court has held that a shipper in *privity* with the carrier can recover under Section 1 of the Interstate Commerce Act for the amount of any tariff overcharge paid by him without proof of pecuniary loss. The Supreme Court has held that this rule is not applicable to an action for treble damages under the antitrust laws, and that a person bringing suit under such laws must show that he has sustained a pecuniary loss as a result of the increase in price paid by him. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922). Likewise, in companion cases to the present one, both the Seventh and Eighth Circuit Courts of Appeals have held that a jobber of gasoline is not entitled to recover the amount of the increase in a price resulting from the conspiracy charged in the Madison Oil Case, but that he must show that he has sustained a pecuniary loss as a result of such increase in price. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792.

These decisions are in accord with the well-settled rule of treble damage cases under the antitrust laws that a person is injured in his property only "when his property is diminished". *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906).

III.

There is no conflict between the decision in the present case and that of the Second Circuit Court of Appeals in *Straus, et al.* v. *Victor Talking Mach. Co., et al.*, 297 F. 791 (C. C. A. 2d, 1924), because in that case Straus sustained a pecuniary loss which was measured exactly by

the increase in the purchase price to him. He was forced from a wholesale to a retail market, and he sustained a loss in the amount of this increase in price. In the present case petitioners admit that they are not claiming any lessening in their margins; and they do not deny that here the conspiracy has raised both their buying and selling prices and in addition that they had adequate protection from any loss under the guaranteed margin provision of their supply contract.

IV.

There is no conflict between the present case and the freight rate or tariff overcharge cases relied upon by petitioners. A tariff overcharge is recoverable under the Interstate Commerce Act as a matter of law, without proof of a pecuniary loss, and is recoverable only by persons in privity with the carrier. An action under the antitrust laws is not for the recovery of an overcharge or increase in price *as such*, but is "for threefold the damages by him sustained." Recovery is not limited to persons in privity with the wrongdoer, but extends to all persons who have sustained a pecuniary loss as a proximate result of the unlawful act. The Supreme Court has held that the freight rate overcharge cases are not applicable to an action for treble damages under the antitrust laws. *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156, 164-165 (1922).

V.

If the Court considers that compliance with Rule 38 is jurisdictional, the petition for writ of certiorari should be denied because petitioners failed to comply with Rule 38 of the Supreme Court Rules in that they did not serve respondents with a copy of the record within ten days after the filing in the Supreme Court.

ARGUMENT.

I.

The Petition for Writ of Certiorari Should Be Denied Because the Finding of Fact of the Circuit Court of Appeals That Petitioners Sustained No Damage Is Supported by the Undisputed Evidence in the Record.

Petitioners offered no affidavits or evidence in opposition to the motion for summary judgment but by stipulating at the pre-trial conference that they were not claiming any lessening in their margins and by basing their case upon the Madison Oil Case, they have conceded that the increase in their buying price was passed on to their customers or that the guaranteed margin provision of their contract protected them from any loss.

Petitioners agreed at the pre-trial hearing as follows:

> "Mr. Searls (Attorney for respondents): • • • It is my understanding, Mr. Michel, that you are not claiming under this complaint that your margin of profit was lessened on gasoline bought and resold.
>
> "Mr. Michel: That is correct, Mr. Searls, we are proceeding here upon what has been called in this proceeding and in the brief the illegal exaction theory, that a cause of action existed immediately upon the conspiracy taking effect and increasing the price which the plaintiff had to pay for its gasoline over what it would have had to pay but for the existence and the carrying out of the conspiracy.
>
> "Mr. Searls: Is it correct to say that your claim of damages is based on gasoline that was bought and was in fact resold in the ordinary course of business?
>
> "Mr. Michel: Yes.
>
> • • • • •

"The Court: I take it that it may be further stipulated by the parties that the record which is now being made at this pre-trial conference may be considered by the Court as part of the record before him when he passes upon the motion for summary judgment which has been made by the defendants in this proceeding.

"Mr. Searls: That's true for the defendants, your Honor.

"Mr. Michel: And that is true for the plaintiff." (R. 112-113.)

The indictment, which is an exhibit to petitioners' amended complaint, and other proceedings in the Madison Oil Case, which are a part of the record in this case, also establish that the increase in the tank car price (petitioners' buying price) was followed by an increase in the retail price (petitioners' selling price).[1]

Thus, the conspiracy charged by the Government and found to exist by the Supreme Court in the Madison Oil Case was one which had for its purpose the raising of the whole price structure of gasoline in the Mid-Western area (R. 37-38). As stated by the Supreme Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150 (1940):

"* * * the spot market was a 'peg to hang the price structure on.'" (p. 192)

1. The indictment in the Madison Oil Case charged that an increase in tank car prices will result directly in an increase in retail prices of gasoline and that defendants intentionally increased the tank car price of gasoline and in turn intentionally raised the general level of retail prices prevailing in the Mid-Western area, including the Western District of Wisconsin (R. 37, 38). The trial court, in his charge to the jury in that case, instructed them to return a verdict of "not guilty" unless they found that the defendants had intentionally raised the tank car price of gasoline "and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area, including the Western District of Wisconsin" (R. 101).

See opening statements and closing arguments of Government counsel in Madison Oil Case (R. 103, 105-106, 2309, in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, Nos. 346 and 347, 310 U. S. 150 (1940)), and opinion of the Supreme Court in *United States* v. *Socony-Vacuum Oil Co. Inc., et al.*, 310 U. S. 150, 190-192, 198-200 (1940). A court may take judicial notice of its records, *United States* v. *Pink*, 315 U. S. 203 (1942).

Within this price structure, refiners, brokers, jobbers, subjobbers, and dealers were buying and selling and consumers were buying. The same gallon of gasoline might pass through the hands of four or five purchasers before reaching the consumer and each sale would be based on this increased price structure. Thus, upon any unlawful rise in the tank car price, both petitioners' buying and selling prices were increased. The same was true as to the buying and selling prices of the service station dealers purchasing from petitioners. Only the consumer, who is not a reseller, found himself bearing the increase in price. Where the consumer has paid the amount of an unlawful increase, he, and he alone, is the person who has sustained an injury in business or property within the meaning of the Clayton Act. He is the one injured, because his property has been diminished. *Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 399 (1906). Where, as here, the conspiracy has raised the whole market structure, the jobber's or middleman's property has not been diminished. This was particularly true in the present case for the additional reason that petitioners' contract with their supplier guaranteed them a margin of 3½¢ per gallon on the gasoline bought and sold by them (R. 20). Both the trial court and Circuit Court of Appeals emphasized this as an additional fact which disclosed that petitioners sustained no pecuniary loss as a result of the price rise.

Petitioners do not deny and offered no affidavits to contradict the fact that there was an increase in the whole price structure of gasoline in the Mid-Western area, and that this, together with the guaranteed margin provision of their contract, prevented any loss or injury in their business or property. In fact, as suggested by the trial court, the price rise may have been a benefit to them as they were buying and selling on a rising market.

Petitioners contend that they are entitled to recover

treble the amount of any increase in their buying price irrespective of any pecuniary loss. Under such contention petitioners, their service station dealer, and the consumer would each be entitled to recover three times the amount of the original increase upon the same gallon of gasoline. This would create a total liability upon respondents of nine times the amount of the increase. In other cases where the ownership of the gasoline may have passed through the hands of a broker and sub-jobber, the amount of liability would be fifteen times the amount of the increase. Thus, the contention of petitioners that they are entitled to recover treble the amount of any increase in price as such, irrespective of pecuniary damage, is not only contrary to the express wording of the Clayton Act, which requires an injury in business or property, but would lead to the most absurd and inequitable results.

II.

The Petition for Writ of Certiorari Should Be Denied Because Petitioners' Contention That a Person Is Entitled to Recover Under the Clayton Act Treble the Amount of Any Increase in Price Resulting From a Conspiracy, Irrespective of Pecuniary Loss in Business or Property, Has Been Decided Already by the Supreme Court Adversely to This Contention.

Section 4 of the Clayton Act (15 U. S. C. A., Sec. 15), upon which this action is based, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

Petitioners' contention in this case is based upon the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer*

Lumber Company, et al., 245 U. S. 531, 534 (1918), and other tariff overcharge cases, in which the Court has held that under Section 1 of the Interstate Commerce Act a person in *privity* with the carrier can collect the amount of any tariff overcharge paid by him without proof of pecuniary loss.

Respondents contend that an action under the Clayton Act, which expressly requires an injury in business or property, is not for the recovery of an overcharge *as such*, but is for the recovery of damages, that such action is not based on the existence of privity, and that the same rule requiring pecuniary loss as announced in *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, 202-203, 206 (1913), is applicable here.

The Supreme Court has held that the rule of *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, 534 (1918), which is relied upon by petitioners, is not applicable to an action for treble damages under the antitrust laws, and that the rule requiring pecuniary loss, as announced in the International Coal Case, is controlling. In *Keogh* v. *Chicago & Northwestern Railway Company, et al.*, 260 U. S. 156 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:

> "• • • Under § 7 of the Anti-Trust Act, as under § 8 of the Act to Regulate Commerce, *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from

> the carrier the amount by which its exaction exceeded the legal rate. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531 * * *'' (pp. 164-165).

The Court held that the plaintiff must allege more than the mere payment of an increased price, the Court stating:

> ''* * * Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. * * * Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer'' (p. 165).

In companion cases to the present one, both the Seventh and Eighth Circuit Courts of Appeals have held that a jobber is not entitled to recover the amount of the increase in a price resulting from the conspiracy charged in the Madison Oil Case, but that he must show that he has sustained a pecuniary loss as a result of such increase in price. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 644, rehearing denied 314 U. S. 711; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943), certiorari denied 321 U. S. 792. Other jobber treble damage cases to the same effect are: *Leonard* v. *Socony-Vacuum Oil Co., Inc., et al.*, 42 F. Supp. 369, 370 (D. C. W. D. Wis., 1942); *H. E. Miller Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 37 F. Supp. 831 (D. C. E. D. Mo., E. D. 1941); *Farmers Co-Op. Oil Co.* v. *Socony-Vacuum Oil Co., Inc. et al.*, 133 F. (2d) 101, 103, (C. C. A. 8th, 1942).

These decisions are in accord with the well-settled rule that actual pecuniary loss is the gist of an action under Section 4 of the Clayton Act or the substantially similar Section 7 of the Sherman Act. As stated by Mr. Justice

Holmes in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390 (1906):

> "* * * A man is injured in his property when his property is diminished * * *" (p. 399).

Other treble damage cases to the same effect are: *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. (2d) 742, 750 (C. C. A. 9th, 1936), certiorari denied 299 U. S. 613; *Glenn Coal Co.* v. *Dickinson Fuel Co., et al.,* 72 F. (2d) 885, 887 (C. C. A. 4th, 1934); *Jack* v. *Armour & Co., et al.,* 291 F. 741, 745 (C. C. A. 8th, 1923); *Locker, et al.* v. *American Tobacco Co., et al.,* 218 F. 447, 448 (C. C. A. 2d, 1914).

III.

There Is No Conflict Between the Decision in the Present Case and That of the Second Circuit in Straus, et al. v. Victor Talking Mach. Co., et al., 297 F. 791 (C. C. A. 2d, 1924).

Petitioners urge as a ground for jurisdiction in this Court that the decision in this case is in conflict with that of the Second Circuit Court of Appeals in *Straus, et al.* v. *Victor Talking Mach. Co., et al., supra.*

The plaintiff in the Straus Case was a retailer who had been accustomed to buying Victor products at wholesale prices. Because plaintiff refused to abide by certain trade practices imposed by the Victor Company, that company refused to permit Straus to continue to buy at wholesale. His competitors continued to receive the benefit of the wholesale prices. In order to supply his customers, Straus was forced to buy Victor products on the retail market.

This case does not conflict with the present one because:

(1) Straus was forced from a wholesale to a retail market. In other words, Straus was forced to buy and sell on the retail market. *He thus suffered an actual pecuniary loss which was measured exactly by the increase in the price to him.*

(2) Only the price to Straus was raised and he was the only one injured as a result of the conspiracy. His selling price was not raised. In the present case the whole market structure has been raised as a result of the conspiracy and the consumer has borne the increase in price.

(3) In the present case, petitioners do not deny the fact that there was an increase in the whole market structure of gasoline and in addition that they were protected by the guaranteed margin provision of their contract, and they admit that they are not claiming any lessening in their margins.

(4) The Straus Case was urged upon the Eighth Circuit Court of Appeals in *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2d) 747 (C. C. A. 8th, 1941), and upon the Seventh Circuit Court of Appeals in *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967 (C. C. A. 7th, 1943); it was urged upon the Supreme Court in the petition for writ of certiorari which was filed in each of such cases, and the petitions were denied (314 U. S. 644; 321 U. S. 792). In view of the many antitrust decisions holding that pecuniary loss is essential to recovery under the antitrust laws, statements in the Straus Case must be considered in the light of the facts of that case which established that a pecuniary loss had been sustained in the amount of the increase in price which was the difference between the wholesale price and the price paid by Straus.

IV.

There Is No Conflict Between the Decision in the Present Case and the Freight Rate Overcharge Cases and Other Cases Relied Upon by Petitioners.

In support of their contention that they can recover the amount of the increased price as such, petitioners rely on certain freight rate or tariff overcharge cases. These cases are not applicable. The recovery of a tariff overcharge

under the Interstate Commerce Act (49 U. S. C. A. Section 1) differs from a recovery under the Clayton Act, in the following respects:

(1) A tariff overcharge is recoverable as a matter of law, without showing a pecuniary loss, *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Steel & Iron Company*, 269 U. S. 217, 235 (1925); *New York, N. H. & H. R. Co., et al.* v. *Ballou & Wright*, 242 F. 862, 867 (C. C. A. 9th, 1917); *Doughty-McDonald Grocery Company, et al.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, 155 I. C. C. 47 (1929).

(2) As the recovery is of the tariff overcharge as such, only persons in privity with the carrier are entitled to recover—thus, suit must be brought by the one who paid the overcharge and against the carrier which collected the overcharge. *Southern Pacific Company, et al.* v. *Darnell-Taenzer Lumber Company, et al.*, 245 U. S. 531, 534 (1918); *Missouri Portland Cement Company* v. *Director General, as Agent*, 88 I. C. C. 492, 495, 496 (1924); *Nicola, Stone & Myers Company* v. *Louisville & Nashville Railroad Company, et al.*, 14 I. C. C. 199, 209 (1908).

(3) An action under the Clayton Act is not for recovery of an overcharge as such, but is "for threefold the damages by him sustained." Recovery is not limited to persons in privity with the wrongdoer but extends to all persons who have suffered pecuniary loss as a proximate result of the illegal act. A conspirator is liable though he has no dealings with the injured party. The amount of damages may be more or less than the amount of any increase in the price.

Thus, the Interstate Commerce Act authorizes the recovery of a tariff overcharge by the one who pays it in the first instance; the Clayton Act authorizes the recovery of the damages sustained.

The distinctive character of the railroad rate overcharge cases, which do not require proof of pecuniary loss, is emphasized by the fact that in suits by persons under the

Interstate Commerce Act for a violation of Section 2 (unjust discrimination provision) or for a violation of Section 4 (the long-and-short-haul provision), pecuniary loss must be established. *Pennsylvania Railroad Company* v. *International Coal Mining Company,* 230 U. S. 184, 202-203, 206 (1913); *Davis* v. *Portland Seed Company,* 264 U. S. 403 (1924).

The Clayton Act is subject to the same rules of proof as announced in the International Coal Case, and the so-called rate reparation cases construing Section 1 of the Interstate Commerce Act are wholly inapplicable. *Keogh* v. *Chicago & Northwestern Railway Company, et al.,* 260 U. S. 156, 164-165 (1922).

Petitioners cite *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 399 (1906) in which the plaintiff was injured because its property was diminished. The City of Atlanta had purchased pipe for its own use in its own city water system and the pipe was not purchased for resale. Thus, the city was a consumer and it bore the illegally increased price. The City of Atlanta, therefore, actually sustained a pecuniary loss which was measured by the amount of the illegally increased price of the pipe.

Petitioners further cite *Thomsen, et al.* v. *Cayser, et al.,* 243 U. S. 66 (1917), and *Story Parchment Company* v. *Paterson Parchment Paper Company, et al.,* 282 U. S. 555 (1931). In each of these cases the plaintiff had actually suffered a loss and the courts do not even suggest that the payment of an increased price, in and of itself, gives rise to a right to recover the increase without proof of loss. It is true that the amount of an increase in a price may equal the amount of pecuniary loss sustained. This would follow where a person paying the amount of an illegal increase in price has borne the full amount of the increase, but petitioners do not claim that they have borne all, or

any part, of the increase. As stated by the Circuit Court of Appeals, petitioners are seeking "not compensation for damages suffered by defendants' illegal acts, but profits because of said acts."

V.

If Compliance With Rule 38 Is Jurisdictional, the Petition for Writ of Certiorari Should Be Denied Because Petitioners Did Not Serve Respondents With a Copy of the Record Within Ten Days After the Filing in the Supreme Court.

If the Court considers that compliance with Rule 38 is jurisdictional, we call the Court's attention to the following: Petitioners served counsel for respondents with a copy of the petition and supporting brief on July 5, 1945; they filed the record, petition and brief in the Supreme Court on July 10, 1945; and counsel for respondents received from petitioners a copy of the record on July 26, 1945.

WHEREFORE, respondents pray that the petition for writ of certiorari be in all things denied.

Respectfully submitted,

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